

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of :)	
)	
Ronald C. Palimere, President)	
Ron's Discount Gas & Tire Center)	
)	Docket No. RCRA-III-9006-050
R & E Properties, Inc.)	
)	
Market & Lea Mobil)	
Service Center, Inc.,)	
)	
)	
Respondents)	
)	
Ron's Discount Gas & Tire Center)	
(formerly Market & Lea Mobil))	
Wilmington, Delaware)	
Facility ID # 3-000713)	
)	
)	
Facility)	

DEFAULT ORDER

In this proceeding under Section 9006 of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6928 *et seq.*, ("RCRA"), Complainant, United States Environmental Protection Agency ("EPA"), filed, on March 29, 2000, a Motion for Default Judgment for Counts I through VI of the Complaint as to Respondents Market & Lea Mobil Service Center, Inc. ("M & L") and R & E Properties, Inc. ("R & E"). The basis of this Motion is Respondents' failure to file: an Answer to EPA's Amended Complaint¹ ("Complaint"); a response to the Court ordered prehearing exchange; and a response to EPA's interrogatories. Respondents "M & L" and "R & E" have failed to respond to EPA's Motion for Default Judgment.

¹On June 30, 1998 EPA filed an Initial Complaint against Respondent Ronald Palimere only. On August 12, 1999, EPA filed a First Amended Complaint, adding M & L and R & E as Respondents for the allegations contained in the Initial Complaint and reasserted in the Amended Complaint.

Section 22.17 of the Consolidated Rules of Practice (“Part 22 Rules” or “Consolidated Rules”), 40 C.F.R. 20.17(a),² provides that a party that fails to file a timely answer to a complaint, information exchange requirements, or an order of the Court, may be found in default. As such, a finding of “[d]efault by respondent constitutes...an admission of all facts alleged in the complaint and a waiver of respondent’s right to contest such factual allegations.” *Id.*

For the reasons which follow, pursuant to the Procedural Rules, the Court issues this Default Order against Respondents M & L and R & E for Counts I through VI of the Complaint.

I. Findings of Fact

A. M & L’s and R & E’s Failure to Answer Amended Complaint

1. On June 30, 1998, Complainant issued an Initial Complaint pursuant to Section 9006 of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6996, against Respondent Ronald Palimere, alleging that he violated RCRA subtitle I, 42 U.S.C. § 6991-6991(i), the regulations thereunder, and the regulations under the State of Delaware’s authorized underground storage tank program.
2. On October 23, 1998, Respondent Palimere submitted an Answer to the Initial Complaint.
3. On April 1, 1999 EPA filed a Motion to Amend the Complaint, seeking to add “R & E” and “M & L” as Respondents.
4. On August 9, 1999 the Court granted Complainant’s Motion to Amend the complaint. In accordance with that Order, on August 12, 1999, Complainant filed its First Amended Complaint pursuant to Section 9006 of RCRA, 42 U.S.C. § 6996, adding M & L and R & E as Respondents for the allegations contained in the initial Complaint.
5. Service of the Amended Complaint to Respondent R & E was completed on August 17, 1999. Therefore Respondent R & E was required to file an Answer with the Regional Hearing Clerk by September 16, 1999. As of the date of Complainant’s Motion for Default Judgment, March 29, 2000, Respondent R & E had not filed an Answer to the Amended Complaint.
6. Service of the Amended Complaint to Respondent M & L was completed on September 3, 1999. Therefore Respondent M & L was required to file an Answer with the Regional Hearing Clerk by October 3, 1999. As of the date of Complainant’s Motion for Default Judgment, March 29, 2000, Respondent M & L had not filed an Answer to the Amended Complaint.

²Additionally, under 40 C.F.R. 22.15(a) and 22.15(d), an answer to the complaint must be filed with the Regional Hearing Clerk within 30 days after service of the complaint and any failure to “admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.

B. M & L's and R & E's Failure to File a Pre-Hearing Exchange

7. On February 18, 1999 the Court, acting under the Initial Complaint, issued a Pre-Hearing Order for Respondent Palimere to file a Pre-hearing Exchange by April 26, 1999. On April 16, 1999, the Court orally extended this deadline until 14 (fourteen) days after the Court ruled on Complainant's Motion to Amend the Complaint. The Court granted the Motion to Amend on August 9, 1999, with the effect of extending the Pre-hearing Exchange deadline to August 24, 1999.

8. On August 20, 1999, the Court issued an Order Regarding Clarification of Pre-hearing Exchanges, noting that the due date for Pre-hearing exchange for the parties to the Initial Complaint was August 24, 1999.

9. On August 25, 1999, the Court granted Respondent Palimere's request for an extension for the filing of his Pre-hearing until September 3, 1999.

10. As of March 29, 2000, the date Complainant's Motion for Default Judgment was filed against Respondents, Respondent R & E had not filed a Pre-hearing Exchange.

11. As of March 29, 2000, the date Complainant's Motion for Default Judgment was filed against Respondents, Respondent M & L had not filed a Pre-hearing exchange.

12. At least as of November 3, 1999, R & E and M & L were required to comply with the Court's Pre-hearing Exchange Order.

C. M & L and R & E's Failure to Answer Interrogatories

13. The Court's August 9, 1999 Order granting Complainant's Motion to Amend also approved, in accordance with Section 22.19(f) of the Consolidated Rules, "further discovery, short of depositions upon oral questions, as to the items listed in the EPA Response." Order at 2. The purpose of the additional discovery was to allow Complainant to gather information for the purpose of determining the owner(s) and/or operator(s) of the underground storage tanks in question.

14. Pursuant to the Court's August 9, 1999 Order, on October 6, 1999, Complainant completed service of interrogatories on Respondents Palimere, M & L, and R & E in accordance with the Part 22 Rules. Complainant requested that Respondents reply by November 8, 1999, thirty days after the service of interrogatories.

15. As of March 29, 2000, the date Complainant's Motion for Default Judgment was filed against Respondents, Respondent M & L had not filed a response to Complainant's interrogatories.

16. As of March 29, 2000, the date Complainant's Motion for Default Judgment was filed against Respondents, Respondent R & E had not filed a response to Complainant's interrogatories.

II. Conclusions of Law

17. Pursuant to 40 C.F.R. § 20.17(a) Respondents M & L and R & E are each found to be in default in this proceeding. The Default Order is based on three independent grounds: Respondents' failure to file an Answer to the Amended Complaint; Respondents' failure to comply with the Court's Prehearing Exchange Order; and Respondents' failure to provide responses to the Court-approved discovery.
18. 40 C.F.R. § 22.17(a) of the Consolidated Rules provides that a party may be found in default upon failure to file a timely answer to the complaint.
19. Respondents M & L and R & E failed to file a timely Answer to the Complaint, as each failed to file an Answer, by September 16, 1999 in the case of R & E, and at least by October 3, 1999, in the case of M & L, those dates representing thirty days after the service of the Amended Complaint.
20. 40 C.F.R. § 22.17(a) of the Consolidated Rules provides that the Court may also issue a Default Order upon failure of a party to comply with the Prehearing Exchange requirements of 40 C.F.R. §22.19(a).
21. Respondents M & L and R & E have each failed to file a timely Pre-hearing Exchange.
22. 40 C.F.R. § 22.19(g)(3) of the Consolidated Rules permits the Court to issue a default order against a party that fails to provide information directed through an Order for Other Discovery, such as an answer to interrogatories.
23. Respondents M & L and R & E each failed to file a response to Complainant's October 5, 1999 interrogatories.
24. Each of the failures of Respondents M & L and R & E, outlined in the paragraphs above, constitutes a separate and independent basis for the issuance of this Default Order.
25. The default of Respondents M & L and R & E constitutes, for the purpose of this proceeding, an admission of all facts alleged in the Amended Complaint against them and a waiver of Respondents M & L and R & E's right to contest the factual allegations, as set forth in the Amended Complaint.
26. A Motion for Default may seek resolution of all or part of a proceeding. In this instance, per 40 C.F.R. 22.17(b), Complainant has sought default only as to the liability of M & L and R & E, without any request for a penalty assessment.
27. Accordingly, consistent with 40 C. F. R. § 22.17(c), this Order, by virtue of not addressing the penalty issue, does not resolve all outstanding issues and claims in the proceeding and therefore does not constitute the initial decision in this proceeding.

ORDER

Complainant's Motion for Default Judgment against Respondents Market & Lea Mobil Service Center, Inc. and R & E Properties, Inc., as to Counts I through VI, is hereby **GRANTED**. The appropriate penalty to be assessed against Respondents Market and Lea Mobil, Inc., and R & E Properties, Inc. will be determined at a subsequent date, consistent with the procedures set forth in the Procedural Rules. The provisions of Consolidated Rule Section 22.29 apply to this Order.

So Ordered.

William B. Moran
United States Administrative Law Judge

Dated: December 13, 2000

In the Matter of Ronald C. Palimere, President, Ron's Discount Gas & Tire Center, R & E Properties, Inc., Market & Lea Mobil Service Center, Inc., Respondent
Docket No. RCRA-III-9006-050

CERTIFICATE OF SERVICE

I certify that the foregoing **Default Order**, dated December 13, 2000, was sent this day in the following manner to the addressees listed below:

Original by Regular Mail to: Lydia A. Guy
Regional Hearing Clerk
U.S. EPA
1650 Arch Street
Philadelphia, PA 19103-2029

Copy by Certified Mail Return Receipt to:

Attorney for Complainant: James Heenehan, Esquire
Assistant Regional Counsel
U.S. EPA
1650 Arch Street
Philadelphia, PA 19103-2029

Attorney for Respondent: Richard D. Kirk, Esquire
Morris, James, Hitchens & Williams
222 Delaware Avenue
P.O. Box 2306
Wilmington, DE 19899

Norman E. Levine, Esquire
1205 King Street
Wilmington, DE 19801

Respondent: Ronald C. Palimere, President
R & E Properties, Inc.
4010 Concord Pike
2nd Floor, Suite D
Wilmington, DE 19803

Maria Whiting-Beale
Legal Assistant

Dated: December 13, 2000